Supreme Court, U.S.
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95-658 OCT 16 1995

No. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDICES A-G

Adin Falkoff, Pro se
163 Great Oak Lane
Pleasantville, NY 10570
(914)769-3652

October 16, 1995

QUESTIONS PRESENTED

1. Whether constitutional rights to a trial by jury and due process of law mandate that where it is at least equally reasonable under New York State law principles of "transactional analysis" and related case law to find that *res judicata* may not be warranted, preclusion on the basis of prior litigation be denied to the movant in a motion for dismissal by reason of *res judicata*?

2. Whether the constitutional right to equal protection of the laws is subverted by the short shrift given to *pro se* appellants, wherein oral argument before the Appeals Court is limited to but five minutes to deal with both *res judicata* and summary judgment issues with no questions from the Bench, wherein the ruling in favor of the represented appellee provides no rationale for the Court's affirmance of summary judgment, and wherein unregulated excessive printing costs gratuitously incurred by the appellee are assessed against the *pro se* appellants?

3. Whether the Court of Appeals sanctioned such a departure from the usual course of judicial proceedings — by affirming a District Court Order which, in deciding a motion for dismissal under Rule 56(b), consistently favors the movant in evaluating disputed questions of material fact and ultimately bases its decision on the very stereotyping that is eschewed by the Rehabilitation Act whose mandates it was called upon to enforce — as to call for an exercise of this Court's power of supervision in order to further the interest of justice.

PARTIES

The parties to this case are Linda D. Misek-Falkoff and Adin Falkoff, Plaintiffs; and International Business Machines Corporation, Defendant.

OPINIONS and ORDERS BELOW

The principal ruling of the Court of Appeals for the Second Circuit is an unpublished Summary Order, No. 94-7599 filed June 16, 1995, referenced as Misek-Falkoff v. IBM, 60 F.3rd 811 (Table). It appears in Appendix A to this Petition.

An Order of the Court of Appeals awarding costs to the appellee, dated July 27, 1995, a Notice Of Motion for reconsideration of the costs award, dated August 7, 1995, and the Order denying said motion, dated September 11, 1995, appear in Appendix B.

The Memorandum Order by the District Court for the Southern District of New York for the case-in-chief, USDC SDNY 89cv6269 (VLB), was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 854 F.Supp. 215 (May 13, 1994), and is reproduced here as Appendix C.

A Memorandum Order by the District Court, ruling on attorney-client privilege and disclosure of medical information, was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 144 F.R.D. 48 (Sept. 29 , 1992), and is reproduced here as Appendix D.

A Memorandum Order by the District Court holding that an attorney was not entitled to a charging lien or bond was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 829 F.Supp. 660 (Aug. 25, 1993), and is reproduced here as Appendix E.

A decision by the NY Supreme Court, Appellate Division, First Department, in Misek-Falkoff & Falkoff v. International Business Machines & Weis, 162 A.D.2nd 211, 556 N.Y.S.2d 331 (June 14, 1990), the case used as the basis for granting dismissal on grounds of *res judicata*, is reproduced here as Appendix F.

JURISDICTION

The Court of Appeals Summary Order in this matter was filed on June 16, 1995. On September 11, 1995, Justice Ginsburg granted an extension of time to file a Petition for a Writ of Certiorari to and including October 16, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the US Constitution in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VII of the US Constitution in pertinent part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Amendment XIV of the US Constitution in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; New York Executive Law 296(1)(a); New York Civil Rights Law 40-c; Judiciary and Judicial Procedure 28 USCS § 1654. Appendix G[1].

STATEMENT OF THE CASE

The USDC SDNY had jurisdiction based upon the provisions of 28 U.S.C. § 1331, because they arose under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

On September 22, 1989, a complaint was filed in the Southern District of New York on behalf of the plaintiffs herein seeking relief from violations of the Rehabilitation Act of 1973 and related civil rights State laws. The complaint alleged that an employer, International Business Machines Corporation, had subjected an employee, Linda Misek-Falkoff, Ph.D., to adverse discrimination because of her handicaps or perceived handicaps, had failed to offer reasonable accommodations, had failed to engage in dialogue for the purpose of determining reasonable accommodations, and had secretly

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[1] Petitioner apologizes for the missing Appendix G, which was planned to provide statutes for the convenience of the Court. Unfortunately, time has run out. If the Court deems this a deficiency, petitioner will provide it as may be required.

conspired to sever and did sever the employee from activities of the workplace in a prejudicial fashion, solely on account of her handicaps or perceived handicaps, although she was otherwise qualified to perform her job; all in violation of both Federal and State civil rights statutes.

Defendant IBM answered on December 21, 1989. There ensued extensive discovery over the course of three years, entailing travel to distant cities for depositions and eventually adding up to more than 20 depositions and the production of some 6000 pages of documents by the defendant. IBM ultimately moved for dismissal on grounds of res judicata and summary judgment (Rule 56(2)) on September 30, 1992. Plaintiffs answered on November 5, 1992. IBM delayed their reply until March 5, 1993, at which time they also filed a modified motion asking only for dismissal on grounds of res judicata. They then evinced dissatisfaction with that strategy and at a conference which they requested, on May 11, 1993, they asked for and received permission from Judge Broderick to again move for both res judicata and summary judgment. Their new motion was filed on June 16, 1993, and plaintiffs filed a sur-reply on November 19, 1993.

It is noteworthy that IBM's motion for res judicata did not rest on any facts or circumstances not known or extant before discovery started. Contrastingly, plaintiffs learned of evidence which would have supported that part of the pleadings in the antecedent Weis case which the Appellate Division, First Department did not reach (see Appendix F):

> Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

The "concerted course of action" — as came to light in the course of discovery proceedings — turned out to be a plan by IBM management to exploit Dr. Misek-Falkoff's neurological handicaps to sever her from the workplace under guise of "accommodation." Appendix E includes a ruling that the discovered text,

> "had no problems with case -- 'someone not unsat today -- can you force her out of business.' Yes -- MDIP,"

was not protected by attorney client privilege and could not be quashed. This text was a reported utterance at a meeting of a medical disability panel secretly considering the case of the plaintiff ("MDIP"

stands for Medical Disability Income Plan).[2] The stereotyping essential to carrying out the plan of exploitation, and the secrecy surrounding the consideration of the putative accommodation are violations of the Rehabilitation Act.

Thus, material matters at issue in the instant federal action were explicitly excluded from consideration by the Appellate Division in their ruling in Weis. Perforce, therefore, for that reason (among others) Weis should not have been given the absolute preclusive effect attributed to it, independent of other considerations such as the applicability of Rule 60(b) as a consequence of the deception perpetrated on the court[3] during the course of that litigation.

More detail on the nature of the case can be found in Appendix H, a reformatted version of the Appellant Brief to the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

That federal courts must give full faith and credit to state court results is not in question. Case law is replete with judicial affirmation of this. But characteristically, although a leading case, Matter of Reilly v. Reid, 45 NY2d 24, 407 NYS2d 645, 648, 379 NE2d 172 (1978), leaves the way open with the permissive phrase, ". . . separately stated causes of action may . . . be grounded on the same gravamen . . ." the "may not" seems to be generally overlooked. This Court may wish to take action to foster a more equitable balance in such matters — especially as "transactional analysis" is spreading widely among the States.

The Second Circuit Appeals Court, in Teahan v. Metro-North 951 F.2d 511 (2nd Cir 1991) reversed and remanded a finding of summary judgment, in the course of which it cogently stated the aims of the Rehabilitation Act and the consequent obligations on the employer and the courts:

> For an employer to assume that simply because of a handicap an individual is unable to function in a given employment

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[2] Present at the panel meeting in Bethesda, Md., for the express purpose of influencing the decision about the Dr. Misek-Falkoff, were the Research Division Personnel Director and the IBM Regional Medical Director, both from the New York area and neither one normally attendant at such meetings.

[3] Through a sequence of sworn statements by IBM's attorneys it was falsely maintained to the court that Dr. Misek-Falkoff could return to active employment at some time, whereas discovery in the instant case made it clear that this was out of the question as far as IBM was concerned.

> context stereotypes that person, seeing him, as it were, through a glass, darkly. To view a handicapped person in such a simplistic way effects the discrimination forbidden by § 504.

Yet in the instant case this same Appeals Court has ratified a summary judgment decision by the lower court which is rife with stereotyping, notably in the speculation that a person with a neurological handicap would require "total insulation from supervisors or coworkers . . . " to forestall "chances of recurrent outbursts." This Court may deem it useful and necessary to resolve such a blatant contradiction and give direction as to the proper attitude for the courts to assume in such situations.

The costs of litigation tend to drive many people out of the market for judicial intervention, while others, feeling the weight of injustice, make a sincere effort to represent themselves. This High Court may deem it desirable to examine and influence how *pro se* litigants fare as a class, while reviewing the treatment accorded these plaintiffs.

CONCLUSION

If this Court elects not to address the issues presented in this petition at the present time, it is requested that the writ issue and that the matter be remanded to the Second Circuit Court of appeals for edetermination in the light of the facts above and further instances of differences in their own recent rulings; for example, on preclusion in LaTrieste Restaurant and Cabaret v. Village of Port Chester, 40 F3d 587 (1994), and on Rehabilitation Act issues in Borkowski v. Valley Central School District.

Dated, October 16, 1995

Respectfully submitted,

Adin Falkoff

Adin Falkoff, pro se petitioner

Misek-Falkoff & Falkoff

v.

IBM

NO. 94-7599

United States Court of Appeals,

Second Circuit.

June 16, 1995

Appeal From: S.D.N.Y., 89-cv-6269 854 F.Supp. 215

AFFIRMED.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Second Circuit provides by rule for disposition by summary order when a decision is unanimous and each judge believes that "no jurisprudential purpose would be served by a written opinion." Decisions without formal opinions "shall not be cited or otherwise used in unrelated cases." Second Circuit Rules, s 0.23, 28 U.S.C.A.)

END OF DOCUMENT

DC: SDNY
DC# 89cv6269
Jdg Broderick

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 16th day of June, one thousand nine hundred and ninety five.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Circuit Judges

June 16 1955

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,
Plaintiffs-Appellants,

v.

ORDER
94-7599

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Adin Falkoff, pro se, appeals from Judge Broderick's grant of International Business Machines Corporation's ("IBM's") motion for summary judgment dismissing the complaint he filed with Linda D. Misek-Falkoff. On appeal Falkoff contends that his -- and his spouse's -- claims are not precluded by a previous New York State judgment and that summary judgment should not have been granted because there are genuine issues of material fact. We disagree. The claims are precluded by a prior state court judgment.

A state court action filed by the Falkoffs in 1988 claimed that various conduct on IBM's part constituted intentional infliction of extreme emotional distress. The factual allegations related to an alleged campaign of harassment by IBM during the final years of Misek-Falkoff's employment. The same alleged campaign of harassment forms the factual foundation for the claims asserted in the instant case.

Federal courts give state court judgments the preclusive effect they would have under the law of the state where judgment was rendered. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80-81 (1984). New York has adopted a transactional approach to res judicata. Thus, a claim that arises out of the same pattern of facts as a previously litigated claim is barred, whether or not the later claim rests on a different legal theory or seeks different relief. LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester, 40 F.3rd 587, 591 (1994); see also Reilly v. Reid, 379 N.E.2d 172, 176 (N.Y. 1978) ("[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.") In addition, under New York Law, a dismissal of a prior action on statute of limitation grounds is "'on the merits' for claim preclusion purposes." Smith v. Russell Sage College, 429 N.E.2d 746, 750 (N.Y. 1981).

In the instant case, two of the claims raised in the previous action were dismissed on statute of limitations grounds, see N.Y. Civ. Prac. L. & R. § 3211(a)(5), and the balance of the claims were dismissed for failure to state a claim, see N.Y. Civ. Prac. L. & R. § 3211(a)(7). The Appellate Division affirmed the dismissal, Misek-Falkoff v. International Business Machines Corp., 556 N.Y.S.2d 331 (1st Dep't 1990), and the New York Court of Appeals denied leave to

appeal, Misek-Falkoff v. International Business Machines Corp., 561 N.E.2d 890 (N.Y. 1990). The instant action is thus precluded under New York law.

We therefore affirm.

Appellee's motion to dismiss the appeal is denied as moot.

Hon. James L. Oakes, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. J. Daniel Mahoney, U.S.C.J.

S.D.N.Y.(wpny)
89-cv-6269
Broderick, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals f the Second Circuit held at the United States Courthouse in the City of New York, on the Twenty-seventh day of July, one thousand nine hundred and ninety five.

July 27 1955

Adin Falkoff,

Plaintiff-Appellant,

v.

94-7599

International Business Machine,

Defendants-Appellee.

A motion having been made herein for costs incurred on appeal, upon consideration thereof, it is ordered that appellant reimburse appellee, at the prevailing rate of 20¢ per page, the following amount: $183.61 for reproduction of 20 copies of the brief, inclusive of sales tax; $476.69 for reproduction of 13 copies of the appendix, inclusive of sales tax; and $2,143.90 for reproduction of 13 copies of the supplemental appendix, inclusive of sales tax, for a total of $2,804.20.

James L. Oakes (per RW)
Ralph K. Winter
J. Daniel Mahoney (per RW)
Circuit Judges

RKW JLO JDM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7599

Misek-Falkoff & Falkoff
v.
International Business Machines Corporation

NOTICE OF MOTION
for reconsideration of an Order of this Court, dated July 27, 1995

Brief statement of the relief requested: Reconsideration of Order granting costs to appellee in light of new factors set forth, and consequent denial or significant reduction in such costs.

Adin Falkoff, pro se Plaintiff-Appellant
Date: 8/7/95

IT IS HEREBY ORDERED that the motion be and it hereby is
~~granted~~ denied

James L. Oakes (per RW)
Ralph K. Winter
SEP 11 1995 J. Daniel Mahoney (per RW)
Circuit Judge

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Should this Court reconsider its Order of July 27, 1995, which awarded costs to the appellee, and reduce or eliminate this tax on the pro se appellants?

Brief statement of the facts (*with page references to the moving papers*):

Appellant was not earlier aware of the pro se exception which allows an appellee to submit an appendix without leave of the Court, and the implications thereof. He also did not immediately recognize the contradictions between the appellee's stated purpose for their appendix, as given in a recent letter to the Court, and the actuality of their 818-page appendix.

Summary of the argument (*with page references to the moving papers*):

Appelleee submitted a two-part "Supplemental Appendix" which was both reduplicative of the appendix submitted by the appellants, and egregiously wasteful in its duplication of the record. Because this was a pro se case, the appellee was permitted to submit an appendix without leave of the Court, and intemperately included 750 pages whose inclusion is not justifiable.

By appellee's own criteria set forth in their letter of June 10, 1995, only 58 pages out of 818 should have been included in their "supplemental Appendix."

The costs calculated in the July 27, 1995, Order of this Court do not conform to the numbers in the invoice submitted by the appellee.

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant
No. 89 CIV 6269(VLB)
United States District Court, S.D. New York
May 13, 1994
MEMORANDUM ORDER

BRODERICK

I

The complaint in this case alleges placement of plaintiff employee Linda D. Misek-Falkoff[1] on permanent disability status by International Business Machines Corporation ("IBM"), the defendant employer (the "employer") in violation of Section 504 of the Rehabilitation Act of 1973 (the "Act"), 29 USC 794. Primarily involved is an issue of res judicata. Absent res judicata there are issues of whether plaintiff was "otherwise qualified" to retain her job[2] within the meaning of the Act and if so whether the defendant employer made "reasonable accommodation" in light of plaintiff's handicaps.

Plaintiff suffered during her employment from a physical disorder related to the nervous system. Her condition caused her to be unable to work at unpredictable times. Her unavailability for work lasted for varying lengths of time, sometimes for days; she had substantial absences in connection with her physical disorder, and as the result of surgery in 1985 to alleviate the disorder.

Even when plaintiff was present in the workplace there were problems: plaintiff at times exhibited fits of rage, emotional outbursts, crying episodes and similar behavior, making it difficult if not impossible for many co-workers and supervisors to get

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[1] Adin Falkoff, plaintiff on a loss of consortium claim, is also an employee of the defendant employer. References to the plaintiff in this memorandum order pertain to Linda D. Misek-Falkoff. In light of the disposition in this memorandum order, I do not reach Mr. Falkoff's claim, which is dismissed.

[2] When on permanent disability an IBM employee is considered inactive and may not return to work.

along with her. The extent to which these episodes were directly related to, the result of, or independent of her physical condition is unclear. These difficulties increased after mid-1985.

Plaintiff claims that the employer knew about her physical condition, but that for some two years the employer harassed her and restricted her career advancement and job opportunities and eventually removed her from her position as a computer analyst and office educator. She notes that during the period of alleged harassment she received positive job evaluations. She claims that the employer's "campaign" to force her out constituted discrimination on the basis of her handicap in violation of federal law.

The employer moves for summary judgment dismissing the complaint under Fed.R.Civ.P. 56 on the grounds that plaintiff's claims are barred by res judicata,[3] and that plaintiff cannot establish a handicap discrimination claim as a matter of law.

While the employer's personnel practices were at times far from ideal and may not be fully excusable even in the difficult circumstances involved, none of these lapses suggests violation or intent to violate any of the statutory guarantees at issue in this case.

The employer's motion to dismiss is granted.

II

The employer is a leader in the development and manufacturing of computer systems. Plaintiff is a former college professor holding a Ph.D. degree with a background in computers and linguistics. Plaintiff, who is now an attorney,[4] began employment as an at-will employee with IBM in the summer of 1977, first as a senior

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[3] After this motion was fully submitted but not yet decided, plaintiff Linda Misek-Falkoff expressed a desire to "drop all lawsuits," Dkt. # 86, but in light of subsequent indications to the contrary, it appears appropriate to rule on the employer's motion for summary judgment.

[4] Plaintiff attended law school in the evening while working for the employer and earned a J.D. degree after being placed on permanent disability.

associate programmer and then as a staff systems analyst (office educator).[5]

Through at least the last seven years of her employment plaintiff suffered from sharp head pains and other symptoms associated with atypical trigeminal neuralgia, a disorder of the nervous system,[6] and she had attacks at unpredictable times. Plaintiff was in frequent communication with the employer's medical department, as were her own physicians, and plaintiff often worked "to tolerance" (that is, as much as possible) or for half-days. Plaintiff sometimes worked at home but not on a regular basis.

Beginning in 1984, plaintiff's medical condition worsened. She was frequently absent, sometimes for extended periods, due among other things to hospitalization in connection with medical tests and brain surgery in July of 1985, and to emotional reactions to work-related experiences. She received satisfactory personnel appraisals in June 1982, August 1983, September 1984, and December 1986. None of the written evaluations contained any comments in the section provided for "significant positive or negative influence on the performance of other employees." The employer claims that performance appraisals, which are made in writing, are limited to performance while actually at work and that "conditions of work" such as absences and personal conduct would not be reflected on an employee's personnel appraisal or result in an unsatisfactory evaluation "unless excessive."[7]

This may have minimal significance in the context of this particular case. There were oral criticisms by her supervisors of her ability to work with others: plaintiff was keenly aware of, and in

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[5] Plaintiff's description of her job title differs from the employer's description in that plaintiff claims she was lead office educator.

[6] At deposition plaintiff's surgeon described atypical trigeminal neuralgia as painful and difficult to diagnose.

[7] The employer's evaluation system was based on a scale of "1" to "4" in the satisfactory category, with "1" meaning "results far exceed the requirements of the job in all key areas." Plaintiff's performance in 1982 was rated "3"; in 1983 and 1984 she was rated "2"; and in December 1986 she was rated as "3."

The employer's employee manual describes ratings and pay raises as feedback on how an employee is doing. Plaintiff received a pay increase in October 1986.

fact disputed, these oral criticisms. Even prior to 1985, plaintiff and her managers had difficulty in working together,[8] and she exhibited occasional extreme emotional reactions in the workplace. Thus written memorialization of such matters would merely have been inflammatory.

In mid-1985 plaintiff's job involved designing software systems, which included working with people within her own group both at regular meetings and one-on-one as a normal part of developing each system. Her job also encompassed attending technical conferences on behalf of the employer, meetings with customers, and undergoing training to keep up-to-date in the field.

An incident triggering events leading to this lawsuit occurred on May 29, 1985.[9] When the departmental computer trainer failed to include plaintiff in a training session, an altercation erupted. The computer trainer transmitted an account to his manager and others by electronic mail alleging that plaintiff had attempted to assault him. Plaintiff vigorously denies the computer trainer's version of this incident: plaintiff claims that at most she brought her hand down "in frustration" on a table next to the place where the computer trainer was sitting, denting some slides in a binder.[10] Both employees appear to have been shaken by the incident, as was a third employee, who observed the encounter and claimed thereafter to be afraid of plaintiff.[11]

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[8] In light of the protective orders in this case, including an order dated March 25, 1992, and concern about unnecessary disclosure of medical and other potentially confidential records, materials of this nature are provided in sealed exhibits. See Sealed Exh 1 (Defendant's Notice of Motion, Exh 1 [1981-1984]).

[9] I make no findings as to who was at fault in this and any other incident set forth in this memorandum order.

[10] Plaintiff claims she immediately offered to replace the slides. See Plaintiff's Sur-reply Aff, Exh. 7 (Pl's Aff in Opposition to Defendant's Motion for Summary Judgment in Misek-Falkoff v. Keller, Index No. 17918/86, New York Supreme Court, Westchester County (1986, Guranian, J.).

[11] Contemporaneous reports of this incident include a suggestion not specifically controverted by plaintiff--that her reaction may have been due in part to unrelated events in her personal life. See Sealed Exh 2 (Defendant's Notice of Motion, Exh O).

Several weeks later, plaintiff was involved in a second incident, this time with her manager, in which plaintiff claims that the manager grabbed from plaintiff's hand a telephone which then brushed plaintiff's face. Believing that she had been assaulted, plaintiff called for help from the building security and medical departments. Immediately after this affair, the manager requested to be relieved from supervising plaintiff and was replaced by a more senior manager.

Later in the summer of 1985, plaintiff had neurological brain surgery and was out of work for three months. Upon her return in mid-October 1985, plaintiff's work location was changed in order to keep a distance between plaintiff and the other employees involved in the above incidents; she was later moved to another facility, and her job assignment was modified.

Plaintiff's managers determined that plaintiff should be handled "from a medical standpoint."[12] This approach was developed as a result of two personnel investigations, the second of which was an internal administrative employee appeals process initiated at plaintiff's request to address various of her concerns. After an extensive investigation, an investigative report prepared for the employer concluded that the computer trainer's account with respect to the first 1985 incident was accurate. The report also concluded that with respect to the second incident plaintiff's prior manager had treated her appropriately and that plaintiff had been told of the exact accusations which had been made against her by several employees. The investigative report did, however, criticize both her prior manager and a medical department physician for inconsistent treatment of plaintiff.[13]

Plaintiff disagreed with the process and the findings, and objected to any further meetings with management unless there was positive news on her behalf.

In June, 1986 plaintiff filed a state court defamation suit against the computer trainer.

In December, 1986 plaintiff became upset after a meeting with her supervisors discussing among other topics:

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[12] See Sealed Exh 2 (Def's Notice of Motion, Exh. O).

[13] See Sealed Exh 3 (Def's Notice of Motion, Exh P).

(1) her most recent performance appraisal in which her rating was reduced from "2" to "3," and

(2) the employer's provision of legal representation for the computer trainer, but not for her, in her lawsuit against him.[14]

Plaintiff claims that the employer's handling of these matters constituted "continuing harassment" that led to "a severe recurrence of her atypical trigeminal neuralgia, requiring hospital treatment." Complaint ¶ 13.[15]

In this instance and in other situations, drastically divergent perceptions of what occurred or was happening made it virtually impossible for plaintiff and her supervisors to coordinate their efforts. This is illustrated by plaintiff's version of her reason for picketing Some time in March 1987 near the employer's grounds by holding up a sign carrying a one-word message, "Why." As relayed through her physician to the employer in a document submitted to the court, this was a "subdued move" to indicate the "extreme stress connected with the suit" against the computer trainer and to "demonstrate her plight" because of the employer's provision of legal representation for the trainer.[16]

Mandatory disability had been first considered with respect to plaintiff in early 1986. Plaintiff's managers had by-passed the administrative approach leading to possible termination without benefits[17] and applied instead, in accordance with company policy,

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[14] No statute or other legal requirement has been cited relating to an employer's contributions to legal defense of employees sued by other employees because of events in the workplace.

[15] Plaintiff was absent from the workplace during most of January and February 1987. She claims that her absences were attributable to her employer's "locking her out" so that she could not return despite being "ready, willing and able." Plaintiff does not, however, specifically controvert evidence to the contrary as to portions of that time period. See Sealed Exh 4 (Def's Reply, Exh E).

[16] See Sealed Exh 5 (Plaintiff's Affidavit, Exh 28).

[17] Procedures for employer-initiated separation included an administrative track, whereby an at-will employee was given an opportunity to improve over a period of time but "conditions of employment" such as absences and personal behavior were taken into account in measuring an employee's performance.

for her placement on the employer's Mandatory Disability Insurance Plan ("mandatory disability" or "MDIP").[18]

A handwritten record of a February, 1986 medical disability panel review meeting contains the following note by an attorney: "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP."[19] The reviewing authorities, however, rejected any such action on the grounds that plaintiff was just getting back from a physical illness and should be given another chance.

On March 27, 1987 plaintiff became so upset that she was carried to the medical department, and was later driven to her physician's office. In a state court action against the employer prior to this federal litigation, plaintiff characterized this incident as follows:

> . . . [Plaintiff] was called to Yorktown on or about March 27, 1987 for a technical meeting with [her manager]. Instead of discussing technical matters [the manager] angrily confronted her with charges that she was a troublemaker because she had used a public utility computer program to try and register for a PC course open to the community.
>
> Since [the computer trainer] was the registrar and had complained to management, [the manager] told this plaintiff that she was now in trouble with four managers. [He] made more cuts in her job at that point.
>
> [Plaintiff] was so emotionally distressed and exhausted by this confrontation that she collapsed in the hallway trying to leave the building, and was taken to the Medical Department quite upset about [her manager's] conduct.

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[18] I make no determination of the validity of the employer's medical assessment. Such a finding is not necessary to my decision on this summary judgment motion since I assume without deciding that plaintiff was handicapped.

[19] See Sealed Exh 6 (Pl Aff, Exh 13); Misek-Falkoff v. IBM, 144 FRD 48 (SDNY 1992).

> . . . [She returned to work] on or about April 7, 1987, following a week of hospitalization consequent to the confrontation with [her manager].[20]

Plaintiff's absences, above average at times in the past, increased in frequency beginning in late 1986. Even disregarding certain disputed absences in early 1987, plaintiff was out of the workforce because of her illnesses for more than the ten percent that would normally trigger an inquiry by the employer. Plaintiff was apparently still upset over the May 1985 altercation with the computer trainer: she was apprehensive about coming to work, and she was absent from the workplace for long periods when events or comments with which she disagreed were presented to or became evident to her.

In April 1987 medical disability was considered again based on increased absences and diminished productivity. A memorandum from plaintiff's manager-- not controverted by plaintiff--states that plaintiff's absences contributed to a five-month delay in introducing to the market a product on which plaintiff was working.[21]

In late May, 1987 plaintiff was injured in a traffic accident.[22] She reported to work but was then absent again, with the exception of a week or so in June, recuperating from the accident and taking a week's vacation, with an anticipated return of July 6, 1987.

A review by the employer in June 1987 led to a decision to place plaintiff on medical disability. In preparation for speaking with plaintiff, her personnel supervisor was advised that if she said "I want to quit," the proper response was "no matter what she says, or does, this will be handled as a medical disability income plan--not voluntary resignation."

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[20] Def's Notice of Motion, Exh E (Amended Complaint in Misek-Falkoff v. IBM, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.) at PP 55, 56); Pl. Sur-Reply Aff at P 16.

[21] See Sealed Exh 7 (Def Notice of Motion Exh G). The manager died in the fall of 1987.

[22] The nature of plaintiff's injuries has not been specified.

On July 6, 1987 after unsuccessful attempts to meet with plaintiff, the Director of Computing Systems notified her by telephone at home that she had been placed on the employer's Medical Disability Insurance Plan on a mandatory basis and could not return to work. Plaintiff was told in a letter dated July 6, 1987 that the decision was made "in light of your medical history after careful consideration of your high absence record, your periodic disruptive, unbusiness-like conduct at work and your inability to perform the requirements of your position consistently."[23]

She was in fact placed on inactive status that day, with the option of accepting or rejecting the benefits available under the employer's disability plan. Plaintiff's benefits under the plan include 40% of salary as well as dental and medical health benefits until the age of 65, and retirement benefits thereafter. Plaintiff has accepted these benefits.

Plaintiff alleges that she suffered a nervous breakdown on the day she received notice of her placement on the disability plan, and that while hospitalized she had a heart attack.

Plaintiff asserts that the mandatory disability decision and the events surrounding it indicate that she cannot resign, but she has not attempted to do so.

The employer's handbook states under the heading "Termination of Employment":

> [The employer] has not established any specific term of employment; therefore, termination may be initiated at any time by either an employee or by management. If you initiate the separation, it is considered a voluntary resignation . . .
>
> Separation may also be initiated by management. Reasons for separation may include, but are not limited to: failing to meet [the employer's] performance, punctuality or attendance standards, engaging in misconduct or violating a company policy.[24]

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[23] Pl. Sur-reply Aff, Exh 1.

[24] Def. Reply Aff., Exh L.

III

Prior to the filing of this federal litigation,[25] plaintiff brought three cases in state court against the employer and/or its employees in connection with the events set forth above:

1. In June 1986, plaintiff sued the computer trainer for defamation and intentional infliction of emotional distress relating to the May 29, 1985 incident; the computer trainer counterclaimed alleging assault.[26] The case was dismissed by the lower court in 1988. In September 1989 the state appellate court affirmed the lower court's dismissal of the claims for intentional infliction of emotional distress and slander but reversed a granting of summary judgment on other claims relating to defamation. 153 A.D.2d 841, 545 N.Y.S.2d 360 (2d Dep't 1989). On remand, the case went to trial in October 1993 with respect to the surviving claims and the complaint was dismissed. Plaintiff's appeal of that decision is pending.[27]

2. In May 1988, plaintiff sued the employer and one of her former managers in state court, alleging that during the three years prior to her being placed on disability the defendants had "engaged in a campaign of tortious infliction of emotional distress" against her.[28] This case was assigned to the same state court judge as the suit against the computer trainer cited above. The appellate court affirmed the lower court's dismissal of plaintiff's claims, 162 A.D.2d 211, 556 N.Y.S.2d 331

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[25] On July 10, 1989, plaintiff filed a complaint identical in all respects to the present complaint but naming in addition to the employer five of its employees (89 Civ 4663), see Def Reply Aff, Exh B; this complaint was neither served nor amended. Instead, the complaint in the present case (89 Civ 6269) naming only the employer was filed as a new action on September 22, 1989.

[26] Misek-Falkoff v. Keller, Index No. 17918/86, New York Supreme Court, Westchester County (1986, Guranian, J.)

[27] Letter from William E. Weber, Dec 1, 1993, Dkt # 90 at 2.

[28] Misek-Falkoff v. International Business Machines Corporation, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.)

(1st Dep't 1990). The New York Court of Appeals denied an appeal, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890 (1990) (Table).[29]

3. In July 1988, plaintiff brought an action against the employer seeking an injunction compelling the employer to train her and permit her access to and use of the employer's computer facilities and personnel so that she personally could search for and retrieve massive amounts of allegedly personal data that she had placed in the employer's computer systems. This lawsuit was dismissed in April 1991 but the employer was enjoined from destroying any of plaintiff's records.[30] An appeal is pending.

VI

The employer seeks to dismiss plaintiff's claims on the grounds of res judicata, based on plaintiff's prior state court action, Misek-Falkoff v. International Business Machines Corporation, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.), (the "May, 1988 state court lawsuit"), in which plaintiff's claims have been dismissed with finality.

Congress has provided that a state court's judgment shall have the same full faith and credit in federal court as in the courts of the state. 28 USC 1738 mandates that a federal court apply,

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[29] On October 13, 1993, after obtaining new counsel, plaintiff applied to the state court judge for relief under N.Y. CPLR 5015(a) apparently from that judge's dismissal of both the case against the computer trainer and the employment action against the employer, both cases having been originally decided by him. Plaintiff alleged that certain documents, uncovered later during discovery in this federal litigation, raised questions as to plaintiff's employment-at-will status, and were fraudulently withheld from the state court by the employer.

Plaintiff's application was denied as untimely and on the merits on the grounds that the information would not have changed any decision.

[30] Misek-Falkoff v. International Business Machines Corporation, Index No. 9938/88, New York Supreme Court, Westchester County, N.Y. Law Journal, May 9, 1991.

where appropriate, the state court's standard of res judicata.[31] See Migra v. Warren City School District Bd. of Education, 465 U.S. 75 (1984); Burgos v. Hopkins, 14 F3d 787, 790 (2d Cir 1994); Antonsen v. Ward, 943 F.2d 198 (2d Cir 1991). The preclusive effect of a failure to raise a civil rights claim that could have been but was not raised in an earlier state proceeding that went to judgment is similar to that concerning any other claim. Migra, 465 U.S. at 83-85 (42 USC 1983).

New York law uses a pragmatic analysis for testing whether a succeeding lawsuit is barred because based on the same set of underlying facts. Smith v. Russell Sage College, 54 NY2d 185, 445 NYS2d 68, 71, 429 NE2d 746 (1981). A cause of action which cannot be revived once dismissed "may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the actions is brought." Smith, 445 N.Y.S.2d at 71, quoting Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 648, 379 N.E.2d 172 (1978).

Even when different legal theories depend on "shadings of the facts, or would emphasize different elements of the facts or would call for different measures of liability or different kinds of relief," Smith, 445 N.Y.S.2d at 71, the subsequent claim may be barred. The analysis depends on how "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id.

The underlying factual allegations as to the conduct of the employer were substantially identical in the state court litigation filed against the employer in May, 1988 and in this later federal case. No new facts not in existence or known to the plaintiff in 1988 were alleged in this subsequent federal action, see 175 East

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[31] The distinctions between different forms of preclusion such as claim, issue, res judicata narrowly defined, and related doctrines need not be discussed here.

75th Corporation v. Hartford Accident & Indemnity Co., 51 N.Y.2d 585, 435 NYS2d 584, 590, 416 NE2d 584 (1980).

The amended complaint in the May, 1988 state court action alleged a "campaign" of harassment beginning in 1984, one year further back in time than is alleged in the present federal complaint but including the May and June 1985 incidents and details of plaintiff's interaction with her managers over the next several years. The state complaint referred to plaintiff's "brain stem surgery" to ameliorate her neurological condition, and set forth facts relating to plaintiff's being placed on permanent disability without her knowledge. Allegations in that complaint also included the employer's telephone call to her on July 6 1987, and plaintiff's reaction to these events resulting in an alleged nervous breakdown and heart attack.

Plaintiff's first two claims in the May, 1988 state court action were dismissed on statute of limitations grounds pursuant to N.Y. CPLR 3211(a)(5). Limitations of actions, often called procedural, "in a practical sense may also be said to be substantive." Smith, 445 N.Y.S.2d at 72; see Koeppel v. Wachtler, 183 AD2d 977, 583 NYS2d 977, 978 (2d Dep't 1992). The balance of plaintiff's claims in the state court action were dismissed, based on the pleadings, for failure to state a claim under NY CPLR 3211(a)(7). The dismissal was not merely because of technical pleading defects but on the merits. Feigen v. Advance Capital Mgt. Corp., 146 AD2d 556, 536 NYS2d 786, 788 (1st Dep't 1989); see Slavin v. Fischer, 160 AD2d 934, 554 NYS2d 659, 661 (2d Dep't 1990). Plaintiff did not seek to replead, although she was aware that discrimination based upon handicap was a basis for legal action.[32] There is nothing in the record, nor has any authority been cited or found, to suggest that plaintiff's claim under the Act, or her pendent state claims, could not have been pursued in the 1988 state court action.

Plaintiff's state court action has been brought to a final conclusion by the ruling of the state's highest court. Misek-Falkoff v. International Business Machines, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890 (1990) (Table). And even had the

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[32] See complaint in this action, ¶ 14 ("In or about April 1985, [plaintiff] began to inquire of [the employer] whether she might be a person with handicaps within the meaning of the ... Act.")

1988 state court suit not been dismissed, the current factually duplicate lawsuit would be improper under Smith.

Not only could plaintiff here have raised all of her claims in state court; she also had the choice of proceeding initially in federal court, an option she failed to exercise. Migra v. Warren City School District Bd. of Education, 465 U.S. 75, 85 n 7 (1984). Thus even if based on different theories or seeking a different remedy, this federal action is barred. To permit plaintiff to proceed with this action would defeat the purposes of claim preclusion. It would permit a disappointed litigant to resort to federal court to trump the state judicial system where the litigant chose to bring the initial litigation and fully exercised the opportunity to litigate the case. See O'Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158 (1981).

Thus plaintiff's federal claim in this action, barred by principles of res judicata, is dismissed.

Under Smith, 445 N.Y.S.2d at 71, plaintiff's claims asserting discrimination in violation of New York Executive Law 296(1)(a) and New York Civil Rights Law 40-c are also barred. Were that not the case, having dismissed the federal discrimination claim I would decline to assert supplemental jurisdiction over plaintiffs' state law claims. See 28 USC 1367(c)(3); see also note 1 above.

V

Summary judgment on the merits of claims is appropriate if there are no genuine issues of material fact and the moving party establishes its right to judgment as a matter of law. Fed.R.Civ.P. 56(c); Tri-Star Pictures, Inc. v. Leisure Time Production, B.V., 17 F3d 38, 42-43 (2d Cir 1994). In order to defeat a motion for summary judgment properly supported by the moving party, the non-moving party must establish a genuine issue of material fact. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The purpose of the motion is to determine whether there is a genuine issue requiring a trial. A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Converse v. General Motors Corp., 893 F.2d 513, 514 (2d Cir 1990).

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48 (emphasis in original). The non-moving party may not defeat a motion for summary judgment by relying "simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. New York, 996 F.2d 522, 532 (2d Cir 1993); SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir 1978). The nonmoving party bearing the burden of proof on the issue at trial must designate "specific facts showing that there is a genuine issue for trial." Celotex v. Catrett, 477 U.S. 317, 324, quoting Fed.R.Civ.P. 56(e). At the same time, all ambiguities must be resolved and reasonable inferences drawn in favor of the nonmoving party. In re Chateaugay Corp., 10 F3d 944, 957 (2d Cir 1993); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir 1986), cert. denied 480 U.S. 932 (1987).

VI

Summary judgment is granted with respect to plaintiff's claim under the Rehabilitation Act.

The Rehabilitation Act (the "Act"), 29 USC 701 et seq., reflects the concern of Congress with "protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'" School Bd of Nassau County v. Arline, 480 U.S. 273, 279 (1987). A primary purpose of the Act is to "deter discrimination against handicapped individuals and to expand their employment opportunities and their integration into society." Gilbert v. Frank, 949 F.2d 637, 639-40 (2d Cir 1991). This broad framework does not, however, prevent an employer from making decisions "based on the job-related attributes of a person's handicaps." Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 513 (2d Cir 1991), cert. denied 113 S Ct 54, 121 L.Ed.2d 24 (1992).

Plaintiff's job was a sensitive one requiring intensive cooperation with other staff members and reliability in performing under time constraints. Does prohibited discrimination arise where a handicapped employee, qualified to perform the technical functions of her job but unable to get along with coworkers and management or to perform effectively in a timely manner, is placed on mandatory inactive status?

To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps, and (4) that the employer was a recipient of federal financial assistance.[33] 29 USC 794; see Bates v. Long Island RR, 997 F.2d 1028, 1035 (2d cir), cert. denied 114 S Ct 550, 126 L.Ed.2d 452 (1993); Doe v. New York University, 666 F.2d 761, 7741-76 (2d Cir 1981).

The Act defines a "handicapped" person as an individual "who (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 USC 706(7)(11). Work qualifies as a major life activity if the individual is significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. See Doe v. New York University, 666 F.2d at 775; 45 CFR 84.3(j)(2)(ii).

Plaintiff's position is that her handicap was limited to her neurological disorder and that she was discriminated against on that basis. For purposes of ruling on this motion, I assume that plaintiff was handicapped.

Was plaintiff qualified to perform the essential functions of her position, despite disability? See School Bd of Nassau County v. Arline, 480 U.S. 2.173, 285 (1987) ("the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief")

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[33] The employer does not challenge this fourth element of plaintiff's claim.

(emphasis in original); Doe v. New York University, 666 F.2d 761, 775 (2d Cir 1981). The Supreme Court has interpreted the phrase "otherwise qualified" to refer to "one who is able to meet all of a program's requirements in spite of ... handicap." Arline, 480 U.S. at 287 n 17; Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir 1991).

To be qualified, the individual must satisfy the requisite skill, experience, education and other job-related requirements of the employment position and must be able to perform the essential functions of the position, with or without reasonable accommodation. Arline, 480 U.S. at 287 n 17; 45 CFR 84.3(k) (1985); Gilbert, 949 F.2d at 641; Matzo v. Postmaster General, 685 F Supp 260, 263 (DDC 1987), aff'd 861 F.2d 1290 (DC Cir 1988).

In the present case, plaintiff satisfied the skill, education and experience requirements of the job. Plaintiff's performance appraisals did not indicate any problems or deficiencies in those areas and indeed did not mention outbursts or difficulties in getting along with other people at the workplace.

Where dismissal is based on factors covered by a positive job appraisal, the appraisal becomes suspect, as do the articulated reasons for dismissal. One may draw the inference that the reasons given are pretextual and that the employee was in fact fired (or in this case placed upon permanent disability) because of her handicap. See Ostrowski v. Atlantic Mutual Ins Companies, 968 F.2d 171, 182 (2d Cir 1992).

The employer's personnel policy encompassed two separate types of employee evaluation, one being periodic written appraisals of job performance based on the employee's duties and responsibilities, and on goals to be achieved on the job, including significant positive or negative influence that the employee had on the job performance of others. In contrast, managers were to identify separately and deal early with problems relating to "conditions of employment" including attendance and personal conduct. The employer's personnel materials indicate that conditions of employment were generally considered to be those which did not impact the technical aspects of performance.[34]

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[34] Plaintiff points out that the employer's personnel policy requires managers to make early identification of problems with regard to conditions of employment, and to make efforts to rectify them.

Whether or not plaintiff was "otherwise qualified" to perform the essential functions of the job turns on the significance of absences and interpersonal relations, factors the employer cites as the basis for decline in plaintiff's ability to perform, and as the reasons for her ultimate removal from active employment, in light of the employer's official job description for a staff systems analyst and office educator. See Overton v. Reilly, 977 F.2d 1190, 1195 (7th Cir 1992) (employer's job description relevant to determination of essential functions of the job); Schmidt v. Bell, 1983 WL 631, *9, 33 Fair Empl Prac Cas (BNA) 839 (DC Pa 1983) ("Deference must be given to the decision of those persons who are in the best position to evaluate whether the individual is able to fulfill the essential functions of the position in spite of the handicap."); EEOC Title I Regulations (employer's judgment as to what the essential functions of the job are can be considered).

By plaintiff's own definition of her duties at deposition, her actual presence in the workplace and predictable availability were essential so that projects could be developed against deadlines important to the employer; so that new systems could be tested in collaboration with other employees; and so that plaintiff was available to attend planning meetings and training sessions. "Some degree of regular, predictable attendance is fundamental to most jobs," Walders v. Garrett, 765 F Supp 303, 310 (ED Va 1991), aff'd 956 F.2d 1163 (4th Cir 1992), and particularly to a job in an organizational setting in which assignments may require team interaction for project development within a timeframe relating to marketing of the product.

What is most significant, however, is not absences as such, but whether or not the job is completed in a timely manner in light of the work involved. See United States EEOC v. AIC Security Investigation, Ltd., 820, F Supp 1060, 1064 (ND Ill 1993) ("What is material is that the job gets done ... This is necessarily a fact intensive determination.") Plaintiff was supposed to function as a component of a research facility developing and testing technically sophisticated products.

It is certainly a "job-related requirement" that an employee, handicapped or not, be able to get along with co-workers and supervisors. Thus, conduct associated with a handicap, as distinct from the handicap itself, may be relevant to the determination of whether a person is qualified. Teahan v. Metro-North Commuter R.

Co., 951 F.2d 511, 517 (2d Cir 1991), cert. denied 113 S Ct 54, 121 L.Ed.2d 24 (1992); see Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 (5th Cir 1983).

An employer may certainly require an employee's presence at the workplace when interaction with others is essential to the task to be performed; the employer may also require that employees, whether handicapped or not, not cause, or contribute to, undue interruptions and hostility in the workplace. See Schmidt v. Bell, 1983 WL 631, *14, 33 Fair Empl Prac Cas (BNA) 839 (DC Pa 1983) ("Mr. Schmidt's post traumatic stress disorder is manifested by his resentment of any type of authority. . . . His volatile, explosive personality is exacerbated under stress and [his job] is inherently stressful. His handicap presents an insurmountable barrier to his employment.").

Plaintiff denies that she was the cause of the 1985 disruptions. She does, however, admit to at least one physically aggressive act in May 1985; to on- going disagreement with her managers and other employees; to unwillingness to cooperate with management decisions as to how to resolve past incidents; and to mistrust of her managers after learning that the employer provided legal services to the computer trainer in connection with her suit against him. She was concededly absent from the workplace for extended periods of time. See Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir 1992) (head nurse unable to come to work until two hours after others because of disability not "otherwise qualified" because no management person would be available).

These factors are sufficient to support the employer's action, unless the employer's ultimate decision was a pretext for discrimination against plaintiff on the basis of handicap. See St. Mary's Honor Center v. Hicks, 113 S Ct 2742, 125 L Ed2d 407 (1993); Doe v. Region 13 Mental Health-Mental Retard. Com'n, 704 F.2d 1402, 1408-09 (5th Cir.1983); Carr v. Barr, 1992 WL 159191, *4 (DDC 1992).

One fact in the record which may support plaintiff's contention that some inappropriate factor--although not necessarily plaintiff's handicap--was in the minds of some of the employer's personnel is a notation in a document made by a single member of the first disability panel review committee in February 1986, stating: "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP." See Misek-

Falkoff v. International Business Machines, 144 FRD 48, 49 (SDNY 1992).

In context, however, the notation is not persuasive of discriminatory intent. The company's decisionmakers creditably rejected this suggestion in 1986, and plaintiff continued to be an employee. It was not until more than a year later, in June 1987, that the decision was taken to place plaintiff on disability: in the interim additional persistent problems had been experienced with plaintiff not related to technical competence but to inability to get along in the workplace, and to unpredictable, extended absences from the workplace.[35]

Where there are external indications of serious difficulties in the interaction between an employee and other employees and staff of the employer, as is the case here, the reality of perceptions of the supervisors, regardless of the correctness of those perceptions, presents a problem for the employer.[36]

If reasonable accommodation can enable an otherwise qualified plaintiff to perform the essential functions of a job, the plaintiff must provide it. School Bd of Nassau County v. Arline, 480 U.S. 273, 287 n 17 (1987); Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir 1991); Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir 1983).

Accommodation is not reasonable if it "either imposes 'undue financial and administrative burdens,' or requires a 'fundamental alteration in the nature of [the] program.'" Arline, 480 U.S. at 287 n 17, quoting Southeastern Community College v. Davis, 442 U.S. 397, 411, 412 (1979).

A plaintiff has the initial burden of coming forward with at least a facial showing that the handicap can be accommodated. Gilbert, 949 F.2d at 6,42. Plaintiff asserts that she could be accommodated by being permitted to work at home, which appears at first glance to be reasonable because the employer's business is computer research and development.

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[35] Plaintiff has complained that she did not have advance notice of the possibility that she would be found to be disabled. Lack of such notice could justify criticism of the employer's policy, but notice would not have had any possibility of resolving the problem.

[36] See Sealed Exh 7 (Def's Notion of Motion, Exh G).

Work at home does not create total insulation from supervisors or coworkers. Personal contact would still be required at critical junctures, triggering chances of recurrent outbursts. Plaintiff required training, and a trainer could not effectively provide training to plaintiff at home and, in any case, teaching requires the type of interaction that is at issue here. An employer is not required to accommodate a disabled employee by eliminating one Of the essential functions of a job. Gilbert, 949 F.2d at 642; Hall v. United States Postal Service, 857 F.2d 1073, 1078 (6th Cir 1988); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir 1985).

The employer made reasonable accommodations by allowing plaintiff to rest in the medical department during the day, to park in handicapped parking areas whenever requested, to take extended absences for medical reasons, and to work part-time and "to tolerance" as needed. The employer also changed her office from time to time at her request, and permitted her to attend law school at night although she was not always coming to work during the day.

Plaintiff has asserted that these accommodations were inadequate and unacceptable. A plaintiff may not, however, complain successfully about the employer's choices if reasonable. "That [the employer] could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that ... additional accommodations were necessary." Wynne v. Tufts Univ. School of Med., 1992 WL 415077 (D Mass 1992), aff'd 976 F.2d 791 (1st Cir 1992), cert. denied 113 S Ct 1845, 123 L Ed 470 (1993).[37]

SO ORDERED

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[37] Plaintiff has asserted that the process by which the employer removed her from active employment meant that she was unable to resign and that her status as an at-will employee was thereby abrogated.

Under Murphy v American Home Products Corp., 58 N.Y.2d 293, 461 NYS2d 232, 235, 448 NE2d 86 (1983), an at-will employee in New York may be discharged for cause or no cause, "absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment." Id., 461 NYS2d at 737.

In keeping with the Thirteenth Amendment ban on involuntary servitude, the employer had no authority to prevent the plaintiff from resigning, although the employer was not obligated to provide benefits if plaintiff resigned.

Dated: White Plains, New York
May 13, 1994

VINCENT L. BRODERICK, U.S.D.J.

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INDEX OF SEALED COURT EXHIBITS TO MEMORANDUM ORDER

Exhibit No.	Footnote	Source
1	8	Def's Notice of Motion, Exh I
2	11, 12	Def's Notice of Motion, Exh O
3	13	Def's Notice of Motion, Exh P
4	15	Def's Reply Aff, Exh E
5	16	Pl's Aff, Exh 28
6	19	Pl's Aff, Exh 13
7	21, 36	Def's Notice of Motion, Exh G

(CITE AS: 144 F.R.D. 48)

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

No. 89 Civ. 6269 (VLB).

United States District Court,

S.D. New York.

Sept. 29, 1992.

Plaintiff objected to discovery rulings of magistrate. The District Court, Vincent L. Broderick, J., held that: (1) minutes of meeting of panel were not within attorney-client privilege, and (2) psychiatric examination of plaintiff could not be disclosed to defendant's employees.

Ordered accordingly.

[1] WITNESSES k204(1)

410k204(1)

Fact that attorney's name appeared in minutes for meeting of panel and that it contained notation that employee could be terminated did not bring the minutes within the attorney-client privilege.

[2] WITNESSES k198(1)

410k198(1)

Attorney-client privilege is narrowly construed, applying only where necessary to achieve its purpose.

[3] WITNESSES k205

410k205

Attorney-client privilege applies only to confidential communications between attorney and client relating to legal advice.

[4] WITNESSES k198(1)

410k198(1)

Fact that person is an attorney does not make everything said between that person and a client privileged.

[5] WITNESSES k201(2)
410k201(2)
Attorney-client privilege does not apply when client seeks legal advice or services in furtherance of future wrongdoing.

[6] FEDERAL CIVIL PROCEDURE k1615.1
170Ak1615.1
Formerly 170Ak1615
Although some aspects of plaintiff's emotional health might be relevant to issue of employment and could be used to extent necessary, information in transcript of psychiatric examination which contained personal information that could be harmful and irrelevant regarding fitness for continued employment could not be disclosed to employer's other employees.

*48 Donald L. Sapir, White Plains, N.Y., for plaintiffs.

*49 R. Scott Garley, Seward & Killel, New York City, for defendants.

MEMORANDUM ORDER

VINCENT L. BRODERICK, District Judge.

By Order dated January 6, 1992, I assigned supervision of discovery to United States Magistrate Judge Mark D. Fox. Plaintiffs have raised objections to two discovery rulings rendered by Magistrate Fox on May 28, 1992: a) upholding objections by defendant IBM to requests for production of a portion of minutes of an IBM meeting, and b) permitting internal dissemination of a report of a psychiatric examination of plaintiff Dr. Misek-Falkoff.

I.

Plaintiffs argue that IBM may not assert the attorney-client privilege regarding a portion of the minutes of a February 19, 1986 meeting of an internal IBM panel concerning the IBM Medical Disability Income Plan ("MDIP"), plaintiff's deposition Exhibit 88, which the Magistrate Judge ruled could be withdrawn from production. Plaintiffs claim that there is no proven nexus between the appearance of an attorney's name in the minutes, and the minutes themselves, to substantiate that

there was a confidential communication. Alternatively, plaintiffs argue that IBM has waived the privilege by producing the document.

Defense counsel produced this document along with others in response to plaintiff's discovery demand. Defendant asserted the attorney-client privilege one month later upon learning that one of the parties mentioned in the minutes was an attorney, Gus Borgeson, employed by IBM in the Armonk office. IBM asserts that Mr. Borgeson was occasionally consulted on MDIP matters when the IBM attorney assigned to the panel, P.J. Danilowitcz was unavailable. It is IBM's contention that since Mr. Danilowitcz was not in attendance at the February 19, 1986 meeting, Mr. Borgeson's name most likely appears in the minutes because he was consulted for legal advice regarding an IBM application for involuntary MDIP benefits for plaintiff Dr. Linda D. Misek-Falkoff. Defendant further contends that production of the disputed segment of the document was inadvertent and that inadvertent production of a privileged communication does not constitute waiver of the privilege.

[1] While panel members and Mr. Borgeson state, in affidavits, that the only communication Mr. Borgeson had with the panel was to provide legal advice, no IBM submission verifies that Mr. Borgeson's name appears in the minutes for the date involved as a result of any confidential communication regarding Dr. Misek-Falkoff or any other matter. Neither is it established that the text in question, "had no problems with case--'someone not unsat today--can you force her out of business.' Yes--MDIP," can be interpreted as legal advice. I find that the text does not, as defendant contends, indicate that legal, rather than business, advice was being given. No legal issues are mentioned.

[2][3][4][5] Because the attorney-client privilege has the effect of withholding relevant information from the factfinder, the privilege is narrowly construed, applying only where necessary to achieve its purpose. Fisher v. United States, 425 U.S. 391, 402, 96 S.Ct. 1569, 1576-77, 48 L.Ed.2d 39 (1976). The privilege applies only to confidential communications between attorney and client relating to legal advice. In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-37 (2d Cir.1984). The fact that a person is an attorney does not make everything said between that person and a client privileged. United States v. Loften, 507 F.Supp. 108, 112 (S.D.N.Y.1981). I can find no basis on which to affirm the ruling that the extract of the minutes is, in fact, a privileged communication between an attorney and client. The ruling that the attorney-client

privilege justifies withholding from plaintiff's deposition Exhibit 88 merely on the ground that an attorney's name was included in the minutes of a meeting, without substantiation of confidential communication, was clearly erroneous and is *50 reversed. [FN1]

FN1. Should the attorney-client privilege otherwise be successfully invoked, the text involved indicates that the question of future wrong would have to be considered. The privilege does not apply when a client seeks legal advice or services in furtherance of future wrongdoing. The Supreme Court has indicated that the attorney-client privilege must "... cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." United States v. Zolin, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469 (1988) (emphasis in original).

II

[6] Plaintiffs also object to denial of their application to limit the scope of individuals who may be permitted to review the transcript with respect to Dr. Misek-Falkoff's psychiatric examination by Dr. Andrew E. Skodol, an expert retained by IBM. On May 7, 1991 Magistrate Judge Fox ruled that the transcript would be afforded confidential status in accordance with my March 25, 1992 Stipulation and Order of Confidentiality with Respect to Certain Medical Records. Plaintiffs requested that physicians and nurses employed or retained by the IBM medical department be excluded from the review, emphasizing the highly sensitive and personal nature of the examination and expressing a desire to protect their privacy against unnecessary intrusion. The Magistrate Judge denied the request with the understanding that the transcript would be given only to those medical personnel whom the defendant would call as witnesses at trial.

In its Memorandum in Opposition to Plaintiffs' Objections to Magistrate Judge Fox's Discovery Rulings, IBM contends that it has a right to use the transcript of its own inquiry and to "show and discuss with its medical witnesses--whether fact witnesses or expert witnesses--anything counsel believes will assist in defending IBM's interests." IBM further maintains that plaintiffs' concern to protect Dr. Misek-Falkoff's privacy within the work environment and her community is not a sufficiently compelling reason for limiting IBM's use of a sensitive and probing transcript.

Paragraph 5 of the March 25, 1992 Stipulation and Order with Respect to Certain Medical Records affords an opportunity for any

party to request a further restriction in the transcript's scope of review:

> "In the event that any party wishes to obtain exemption for any Confidential Matter from any of the terms of this Stipulation and Order, and the parties are unable to agree on the exemption, either party may apply to the Court for appropriate relief."

Communications between a patient and a psychologist, psychiatrist or psychotherapist are usually much more intensely personal than those with physicians and other doctors. Disclosure of such communications and diagnoses could be considered embarrassing and an intrusion into one's privacy, and could cause harm to one's status in the workplace. In determining whether to permit the release of sensitive documents for particular uses in litigation, In re John Doe (U.S. v. Diamond), 964 F.2d 1325 (2d Cir.1992), recognizes a court's need to balance an individual's privacy rights against the litigation needs of opposing counsel.

The medical transcript includes the type of intensely personal communications that the psychotherapist-patient privilege is designed to protect from intrusion by third parties. While some aspects of plaintiff's emotional health may be quite relevant to the issue of employment by IBM, and hence should be allowed to be used to the extent necessary to assure a just presentation at trial, the transcript with respect to the psychiatric examination includes personal information that may be harmful and, in some instances, irrelevant regarding fitness for continued employment.

IBM's expert, Dr. Skodol, was retained to conduct a psychiatric examination and to render an opinion to IBM for purposes of this litigation based on that examination and, perhaps, on a review of other appropriate relevant medical materials which IBM possesses. Dr. Skodol can testify at trial based on the examination to the extent *51 necessary. While release of the transcript to other IBM personnel does not necessarily mean the information will not remain confidential, there is a high risk that it may not. Disclosure to other persons is not reasonably necessary for accomplishing the purpose for which Dr. Skodol was consulted. Cf. Simpson v. Braider, 104 F.R.D. 512, 519-521 (1985) (possibility of injury caused by disclosure of psychiatric information far outweighs the resulting benefit to justice in an individual tort suit).

There is no compelling reason why physicians and nurses of the IBM internal medical department need view the transcript. The risk of invasion of privacy and resultant injury to the plaintiff outweighs any benefit IBM claims would be obtained by releasing the information to staff of the Medical Department.

By limiting the scope of review of the transcript, the court is not placing an undue burden on IBM in accomplishing its objectives. Cf. Dole v. Service Employees Union, 950 F.2d 1456, 1462 (9th Cir.1991) (to the extent that a party may accomplish its objectives and still comply with the court's discovery limitations, those limitations constitute "less restrictive means").

Dr. Misek-Falkoff appears to have been cooperative by not limiting the scope of the examination and by openly answering all questions during the examination, even those which one might find to be questionable and probing of certain personal matters which are not the subject of this action. Dr. Skodol, as IBM's psychiatric expert, should be the only party to review the transcript.

While the Magistrate Judge has been diligent in restricting review of the transcript in other respects and has relied on IBM's assertion that only those who would appear as medical witnesses for IBM would be given access, the ruling that the March 25, 1992 Stipulation and Order with Respect to Certain Medical Records was sufficient, without further restriction, to protect Dr. Misek- Falkoff's privacy was clearly erroneous, and is modified to limit pre-trial dissemination to Dr. Skodol.

SO ORDERED.

END OF DOCUMENT

(CITE AS: 829 F.SUPP. 660)

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

No. 89 CIV. 6269 (VLB).

United States District Court,

S.D. New York.

Aug. 25, 1993.

Action was brought alleging handicap discrimination in violation of Rehabilitation Act. Attorney sought charging lien against judgment or settlement and retaining lien on clients' files. The District Court, Vincent L. Broderick, J., held that attorney was not entitled to charging lien or bond.

So ordered.

See also 144 F.R.D. 48.

[1] ATTORNEY AND CLIENT k182(1)
45k182(1)

"Retaining lien" under New York common law entitles attorney who has rendered services or made disbursements on behalf of client to retain, as security for payment, client's papers and funds which are in attorney's possession.

[2] ATTORNEY AND CLIENT k174
45k174

Plaintiffs' former attorney was not entitled to retaining lien or bond in action alleging handicap discrimination in violation of federal law; authorizing lien would prolong adjudication of merits, fee-shifting statute inextricably weaved the issues with rest of litigation, and setting bond would necessitate separate inquiry into financial solvency of plaintiffs and generate side litigation. Rehabilitation Act of 1973, §§ 2 et seq., 505, as amended, 29 U.S.C.A. §§ 701 et seq., 794a; Americans With Disabilities Act of 1990, §§ 2 et seq., 505, 42 U.S.C.A. §§ 12101 et seq., 12205.

[3] FEDERAL COURTS k407.1
170Bk407.1
Federal law controls nature and extent of attorney's lien in federal question case and perhaps in all cases in federal court.

[4] ATTORNEY AND CLIENT k174
45k174
In fashioning remedies for disputes arising in course of federal litigation between attorneys and clients, federal court may determine whether assertion of retaining lien is in such conflict with important principles that it must be relinquished when balanced against considerations of public policy.

[5] ATTORNEY AND CLIENT k32(4)
45k32(4)
Where fee-shifting statute is involved, there is implicit bargain between attorneys and the public; statute provides potential source of fees to prevailing counsel, and in return counsel may not obstruct course of litigation.

[5] FEDERAL CIVIL PROCEDURE k2737.1
170Ak2737.1
Where fee-shifting statute is involved, there is implicit bargain between attorneys and the public; statute provides potential source of fees to prevailing counsel, and in return counsel may not obstruct course of litigation.

*661 William D. Frumkin, Donald Sapir, White Plains, NY, for moving attorney.

William Weber, Hauppauge, NY, for plaintiffs.

M. William Munno, Michael Enright, Seward & Kissel, New York City, for defendant.

MEMORANDUM ORDER

VINCENT L. BRODERICK, District Judge

I

This suit, initiated in 1989, alleges handicap discrimination by an employer under the Rehabilitation Act, 29 U.S.C. §§ 701 et seq., and is possibly subject to the Americans With Disabilities Act, 42 U.S.C. §§ 12101 et seq.

A motion to withdraw as counsel was filed by plaintiffs' attorney (the "moving attorney"). Before the motion was fully submitted, the plaintiffs retained new counsel. The moving attorney and plaintiff executed a stipulation substituting new counsel for the moving attorney, which stipulation was "so ordered" by me on August 2, 1993.

The pending motion presents questions as to procedures applicable with respect to withdrawing counsel in federal question cases where a critical point in the pretrial phase of the litigation has been reached and where federal fee- shifting statutes are involved.

The moving attorney seeks a charging lien against any proceeds arising from judgment or settlement in the action, and a retaining lien on the clients' files. [FN1] He also requests reconsideration of that portion of an order dated June 9, 1993 which provided that determination of his attorney's fees would be postponed until resolution of the case; he seeks a summary determination of fees and expenses on an expedited basis.

FN1. The moving attorney's motion initially requested only a charginglien; his reply affidavit characterizes the application as one for "a retaining lien and a charging lien".

*662 I grant the moving attorney's request for reconsideration with respect to the June 9, 1993 order, and I modify that order to the extent that I refer this matter to United States Magistrate Judge Mark D. Fox for a report and recommendation as to the amount, if any, of attorney's fees and disbursements due to the moving attorney (see part V below). The matter is to be considered by Magistrate Judge Fox only after defendant's motion for summary judgment has been fully submitted. [FN2]

FN2. In certain cases consistent abuse of legal counsel by a party that repeatedly fails to pay amounts due might warrant other remedial procedures, see, e.g., Harrison Conference Serv. v. Dolce, 806 F.Supp. 23, 27 (E.D.N.Y.1992), but

the dispute over fees here does not outweigh the need to avoid delay at this stage of the litigation.

I deny the application for a retaining lien. The moving attorney is directed promptly to transfer the files in this case to plaintiffs' present counsel. I do not require that plaintiffs post a bond, for the reasons discussed in part IV below.

In light of the delay resulting from the withdrawal and substitution of counsel, plaintiffs' sur-reply with respect to the summary judgment motion is to be filed by October 22, 1993. [FN3]

FN3. Plaintiffs' memorandum of law may not exceed 15 pages, pursuant to my order dated June 9, 1993.

II

The complaint in this case was filed in September 1989 with the moving attorney as plaintiffs' counsel of record. Some six months later, plaintiffs consented to substitution as their counsel of an attorney who left the moving attorney's law firm. The second counsel was relieved as plaintiffs' counsel 13 months later by consent, and the moving attorney once again was retained by plaintiffs. He was permitted to withdraw upon my approval of the most recent stipulated substitution of counsel earlier this month.

A dispute over fees and disbursements arose between plaintiffs and their second attorney at the time she was relieved in early April 1991. I referred that controversy to a special master. The litigation at that time was in the early stages of discovery and the parties were engaged in efforts to achieve settlement of the case. On July 23, 1991 I approved a resolution of the controversy between plaintiffs and their second attorney.

Following payment of the agreed-upon sum to the second attorney, which was far less than the amount now asserted to be due by the moving attorney, the second attorney turned the file over to the moving attorney. [FN4] Plaintiffs' new counsel, who is also representing the plaintiffs in pending state litigation with respect to which a trial has been scheduled in early October, has indicated that materials in the federal case file are necessary to prepare for the state litigation as well as to proceed in the federal case.

FN4. The issue of whether any of the fees and disbursements now sought should include the moving attorney's initial period as counsel will be an aspect of this controversy to be determined by United States Magistrate Judge Mark D. Fox, as set forth in part V below.

In this four-year-old litigation, discovery has been completed. It involved over 33 deposition days and production of approximately 6,000 pages of documents. A summary judgment motion has been filed by the defendants and awaits only a sur-reply by plaintiffs which I have authorized. Extensive negotiations have been pursued including efforts to devise a settlement that would incorporate all outstanding litigation between the parties.

The moving attorney and the plaintiffs dispute both the nature of their fee arrangement and the amounts due. The plaintiffs oppose an early determination of fees, claiming a need to apply their time and money to the pending federal and state litigation, and they seek an extension of time to submit their sur- reply with respect to defendant's motion for summary judgment.

III

A federal court " 'may, in its discretion, exercise ancillary jurisdiction to hear fee disputes ... between litigants and their attorneys *663 when the dispute relates to the main action....' " Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir.1991), quoting Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251, 256 (2d Cir.1988) (citations omitted); see 28 U.S.C. § 1367; Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir 1982).

Litigation between parties and their counsel may be considered peripheral in diversity and certain federal question cases. In suits arising from federal claims where a federal fee-shifting statute in involved, the matter of attorney's fees becomes part of an inextricable whole.

This case does involve a fee-shifting statute. The Rehabilitation Act provides in 29 U.S.C. § 794a that "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." See parallel provision in the Americans with Disabilities Act, 42 U.S.C. § 12205.

Under New York law the moving attorney would have a charging lien [FN5] against any recovery or settlement if the fee has not yet been paid for his services and disbursements, see People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 448, 405 N.E.2d 1012, 1014 (1980), unless the magistrate judge decides that the attorney withdrew without good and sufficient cause, see Marrero v. Christiano, 575 F.Supp. 837, 839 (1983); Holmes v. Y.J.A. Realty Corp. v. Goldman, 128 A.D.2d 482, 513 N.Y.S.2d 415, 416 (1st Dep't 1987).

FN5. Under New York Judiciary Law § 475, an attorney has a charging lien upon the client's cause of action. The statute provides in relevant part:

From the commencement of an action ... the attorney who appears for a party has a lien upon his client's cause of action [or] claim ... which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

While in the normal case I would defer determination of the fees and disbursements due the moving attorney until the resolution of the main case to avoid injecting side issues, see, e.g., Gale v. Stallone, 1992 WL 73476 (S.D.N.Y. Keenan, J.), I depart from that approach here. In deciding to depart I have considered the length of time that the moving attorney has represented the plaintiffs, and the correspondingly large fee and disbursements that may be at issue.

IV

[1] A retaining lien under New York common law entitles an attorney who has rendered services or made disbursements on behalf of a client to retain, as security for payment, the client's papers and funds which are in the attorney's possession. See Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir.1991), citing People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 449, 405 N.E.2d 1012, 1015 (1985).

[2] Authorizing a retaining lien in this case would entail undue delay of the litigation. Such delay would prolong the adjudication of the

merits of the plaintiffs' discrimination claim, and thus I must consider the application of federal law in this federal question case, and the objectives of Fed.R.Civ.P. 1 applicable to all cases brought in federal court.

Although New York provides special circumstances under which a court may order the transfer of case files without payment or a bond, see Jenkins v. Weinshienk, 670 F.2d 915, 919-20 (10th Cir.1982) (citing New York case law); Rosen v. Rosen, 97 A.D.2d 837, 468 N.Y.S.2d 723 (2d Dep't 1983), I do not reach state law grounds in deciding on the availability vel non of a retaining lien.

[3] The nature and extent of an attorney's lien is controlled--certainly in a federal question case, and perhaps in all cases in federal court--by federal law. Pomerantz v. Schandler, 704 F.2d 681, 682 (2d Cir.1983) (per curiam), citing National Equipment Rental Ltd. v. Mercury Typesetting Co., 323 F.2d 784, 786 n. 1 (2d Cir.1963). The purposes of the relevant federal statute should prevail even if a departure from what state *664 law might otherwise provide is necessary, as Resolution Trust Corp. v. Elman, 949 F.2d 624, 627 (2d Cir.1991), makes clear. In Elman, the court determined that the right of a law firm to retain files where a retaining lien might be permissible under state law could be altered where "a federal statute ... superimposes a new arrangement over the state law scheme," id. at 627 (involving the Financial Institutions Reform, Recovery and Enforcement Act of 1989).

[4] In fashioning remedies for disputes arising in the course of federal litigation between attorneys and their clients, a federal court may determine whether assertion of a retaining lien is "in such conflict with important principles that it must be relinquished when balanced against considerations of public policy." Jenkins v. Weinshienk, 670 F.2d 915, 919 (10th Cir.1982); see Elman, 949 F.2d at 629 (the public interest in cases arising under a given federal statute outweighs the purely private interest of the law firm).

[5] Where a federal statute provides for fee-shifting, litigation invoking such a statute is intended by Congress to be for the benefit of the public as well as that of the plaintiffs; the plaintiffs function as private attorneys general. Fee-shifting inextricably interweaves fee issues with the rest of the litigation. Thus, I impose no bond requirement upon the plaintiffs. Given the amount of fees claimed to be due by the moving attorney, setting such a bond would necessitate a separate independent inquiry into the financial solvency of the

plaintiffs and generate side litigation. The fundamental purposes of legislation passed by Congress should not be derailed because a party can or cannot post a bond in connection with transfer of litigation files. Controversies between parties and their attorneys should not hold federal litigation hostage. Where a fee-shifting statute is involved, there is an implicit bargain between attorneys who undertake such cases and the public. The statute provides a potential source of fees to prevailing counsel; in return counsel may not obstruct the course of the litigation. In federal question cases of this type, retention of files should rarely if ever be permitted. [FN6]

FN6. If a retaining lien were to become an even moderately foreseeable possibility in federal question litigation, sophisticated litigants would insist on having their own copies of all papers to protect themselves against potential withholding of files. This would defeat the lien and at the same time increase the cost of the litigation. These concerns do not apply to retention of funds, as opposed to files, where the retention would not obstruct the course of the litigation.

Furthermore the weight of the objectives of Fed.R.Civ.P. 1, sentence 2 is enhanced by the proposed amendments of 1993 which appear to be uncontroversial. The amended Rule 1 calls for the courts to construe and administer the Federal Rules of Civil Procedure to enable federal litigation to proceed without undue delay. See also Judicial Improvements Act of 1990, Pub Law 101-650, 104 Stat. 5089, enacting 28 U.S.C. § 473. [FN7]

FN7. My ruling is supported by current developments in New York law, which are particularly persuasive because the issues tend to arise more frequently in the aggregate in state courts. Most recently Chief Judge Kaye of the New York Court of Appeals has announced significant innovations in the rules applicable to attorneys in matrimonial cases, scheduled to become effective on November 1, 1993. One new rule requires that a withdrawing attorney turn over files to the client within 30 days; the attorney may then apply to the court for a determination of the amount of the attorney's charging lien pursuant to New York Judiciary Law § 475. Proposed additions to Title 22, Official Compilation of Codes, Rules and Regulations of the State of New York, "Retaining Liens" (August 1993). This rule is aimed at expediting litigation where delay is frequently caused by collateral disputes between attorneys and their clients.

V

The problems posed by delay will be mitigated once the defendant's summary judgment motion has been fully submitted. At that time, determination of the attorney's fee issue may promote settlement because uncertainty about fees of the magnitude involved here may make settlement difficult.

Accordingly, the plaintiffs will notify the moving attorney and contact United States Magistrate Judge Mark D. Fox promptly after plaintiffs' sur-reply papers have been submitted.

*665 Judge Fox will make a report and recommendation to me on the following:

(1) Whether or not the moving attorney justifiably withdrew as counsel.

(2) The nature of the fee arrangement, [FN8] the amount, if any, due to the moving attorney and on what basis, whether quantum meruit or otherwise; the reasonable expectation of both parties as to whether the moving attorney's fee would be payable prior to any settlement or judgment, based on such factors as the length of time of the representation and the amount due; and understandings with respect to payment of disbursements.

FN8. I am unable to determine the agreed-upon terms of the moving attorney's representation from the papers now before me.

(3) The issue of financial hardship with respect to the plaintiffs, who have provided preliminary information suggesting insufficient funds, and the impact of any inability to pay prior to settlement or judgment.

(4) Whether or not the proceedings before him should be sealed in order to avoid unnecessary revelation of attorney-client communications.

(5) Whether or not a Fed.R.Civ.P. 54(b) certificate would be appropriate with respect to the action to be taken by me on the magistrate judge's report and recommendation. [FN9]

FN9. It is contemplated that the magistrate judge's report and recommendation will permit me to reach a complete adjudication with respect to the claims of the moving attorney, thus making any separate subsequent proceeding unnecessary.

SO ORDERED.

(CITE AS: 162 A.D.2D 211, 556 N.Y.S.2D 331)

Linda D. MISEK-FALKOFF et al., Plaintiffs-Appellants,
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION et al., Defendants-Respondents.

Supreme Court, Appellate Division,
First Department.

June 14, 1990.

Action was brought for intentional infliction of emotional distress. The Supreme Court, Westchester County, Gurahian, J., dismissed, and plaintiff appealed. The Supreme Court, Appellate Division, held that allegations did not involve such egregious conduct as to sustain emotional distress cause of action.

Affirmed.

[1] LIMITATION OF ACTIONS k31
241k31
One-year statute of limitations governed cause of action for intentional infliction of emotional distress.

[2] DAMAGES k50.10
115k50.10
Defendants' alleged conduct in placing plaintiff on medical disability and in refusing to release certain personal records allegedly belonging to her but stored in computer files did not involve egregious conduct that would sustain cause of action for intentional infliction of emotional distress.

**331 N.E. Henkin, New York City, for plaintiffs-appellants.

R.S. Garley, for defendants-respondents.

*211 Before MURPHY, P.J., and MILONAS, ROSENBERGER, ASCH and RUBIN, JJ.

MEMORANDUM DECISION.

Order of the Supreme Court, Westchester County (Vincent Gurahian, J.), entered on April 12, 1989, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), unanimously affirmed, without costs.

Plaintiff seeks recovery for infliction of emotional distress based upon various acts committed by International Business Machines Corporation (IBM) employees. The majority of these acts occurred more than one year prior to commencement of this action. Those which occurred within a year prior to commencement of the action were the placement of plaintiff on medical disability, and the refusal to release certain personal records allegedly belonging to the plaintiff but stored in IBM computer files. The latter claim is also apparently the subject of another pending action.

[1, 2] The motion court properly applied a one-year Statute of Limitations to the cause of action for intentional infliction of emotional distress (Gallagher v. Directors Guild of America, 144 A.D.2d 261, 533 N.Y.S.2d 863).

Excluding those alleged acts which were beyond the limitations period, the complaint was properly dismissed. Viewing the allegations of the complaint most favorably to the plaintiff, the conduct alleged was not so egregious as to sustain the cause of action (Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86). Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

END OF DOCUMENT